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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 113

AMEREX HOLDING CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The above-named petitioner, by the undersigned, its attorney, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit filed March 19, 1941 (R. 763) affirming a final order and decision of the Board of Tax Appeals filed August 22, 1938 (R. 67).

Opinions Below.

The findings of fact and opinion of the Board of Tax Appeals (R. 19-66) are reported in 37 B. T. A. 1169. The memorandum opinion of the Circuit Court of Appeals, handed down March 3, 1941 (R. 762), is reported in 117 F. (2d) 1009.

Jurisdiction.

The case was brought to the court below by petition for review (R. 68-88) filed November 18, 1938, pursuant to the provisions of Sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended. (See Title 26, U. S. C. A., 1934 Edition, Internal Revenue, Sec. 641, 642; now Title 26, U. S. C. A., Internal Revenue Code, Sec. 1141, 1142.)

The opinion of the Circuit Court of Appeals was handed down March 3, 1941 (R. 762); its judgment was filed March 19, 1941 (R. 763). The jurisdiction of this Court is conferred by Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

The decision of the Board of Tax Appeals sustained the determination by the Commissioner of Internal Revenue (R. 12) of a deficiency of $510,226.02 in Petitioner's 1928 income tax and disallowed Petitioner's claim for refund of tax paid for said year in the sum of $55,638.90. The deficiency and the denial of the claimed refund resulted from the disallowance of Petitioner's claimed loss upon the liquidation of its wholly owned subsidiary, Mechanics Securities Corporation (hereinafter called Mechanics Securities).

All the shares of stock of Mechanics Securities were acquired by Petitioner in 1926 and 1927, under circumstances more fully set forth below, by issuing and exchanging therefor, share for share, 100,000 shares of its capital stock. Petitioner's shares so issued and exchanged constituted one-fourth of its total issued and outstanding shares of stock and had an aggregate value based upon

Petitioner's then net worth of not less than $5,270,545.94. In 1928 Mechanics Securities was dissolved and Petitioner received on final liquidation $444,816.94. Petitioner claimed the resulting loss as a deduction in its 1928 income tax return. It was the disallowance of all but $55,183.06 of this claimed loss which resulted in the deficiency complained of and the disallowance of Petitioner's claim for refund.

The essential facts were agreed upon and are contained in a stipulation and exhibits referred to therein (R. 91-104; received in evidence, R. 104, 105, 107). In addition there was testimony by two witnesses and a few other exhibits were introduced (R. 108-143).

Organization of Petitioner. Petitioner is a New York corporation organized in 1917 under the name Chase Securities Corporation. (Its name has been changed, first to The Chase Corporation and later to Amerex Holding Corporation.) It was formed at the instance of stockholders of The Chase National Bank of the City of New York (hereinafter called Chase Bank), under an arrangement by which their respective interests in Chase Bank and in the new corporation would be the same, to take advantage of business opportunities which were not available to the bank because of its limited corporate powers, and to engage in a general securities business (R. 21, 22).

All of the stockholders of Chase Bank became parties to a deposit agreement between a committee of Chase Bank stockholders and Bankers Trust Company as depositary, and deposited thereunder their shares, then aggregating 100,000 (R. 22, 547). A special dividend of $25 per share was paid by Chase Bank to the committee, which acted throughout as agent for the depositing stockholders. The committee then caused Petitioner to be organized with $2,500,000 capital, represented by 100,000 shares without par value which were subscribed for in the names of the

depositing Chase Bank stockholders, paid for with the proceeds of the special dividend, delivered to the committee and deposited under the deposit agreement (R. 22, 94). To evidence the ownership of the deposited shares of Chase Bank and of Petitioner the depositary issued to each depositing stockholder a definitive engraved receipt in registered form certifying that it held in his name a certificate for his shares of Chase Bank stock and a certificate for his shares of Petitioner's stock (R. 22, 94, 553, 567).

Each of the depositing stockholders agreed (Deposit Agreement, par. Sixth, R. 22, 556) that he would not sell any of his shares of either Chase Bank or Petitioner without at the same time selling to the same purchaser an equal number of shares of the other. Petitioner's certificate of incorporation provided that no shares of its stock issued to any Chase Bank stockholder should be transferable except together with an equal number of shares of Chase Bank and that the transfer of any shares of Chase Bank by a stockholder of Petitioner should operate *ipso facto* as a transfer of an equal number of its shares (R. 22, 373-4); and an amendment thereto in 1926 provided that no shares of Petitioner's stock should be issued unless made available for deposit under the deposit agreement and that no stockholder should be entitled to subscribe for newly issued stock of Petitioner unless at the same time he subscribed for an equal number of shares of Chase Bank and deposited all such shares with the depositary (R. 45-6, 418-9).

The purpose of the foregoing arrangements was to establish and maintain 100% parity of ownership of stock of the Chase Bank and of Petitioner (R. 36-7, 564-5, 583, 595), and such parity was maintained during all the times here involved. Prior to 1926 the outstanding shares of Chase Bank were increased to 200,000, and the outstanding

shares of Petitioner were correspondingly increased and all additional shares of each were deposited under the deposit agreement (R. 23, 94-5).

Organization of Mechanics Securities. On February 11, 1926, Chase Bank and the Mechanics & Metals National Bank of the City of New York (hereinafter called Mechanics Bank) entered into an agreement for the consolidation of the two banks under the name and charter of Chase Bank (R. 23-4, 92-3, 534).

The consolidation agreement provided that the consolidated bank should have a capital of $40,000,000, a surplus of $25,000,000 and (subject to intervening gains and losses in the ordinary course of business of the institutions and payment of regular quarterly dividends) undivided profits of not less than approximately $14,000,000, or a total of not less than approximately $79,000,000; that the capital should be divided into 400,000 shares of $100 par value, of which 200,000 shares should be allotted to the then stockholders of Chase Bank, share for share, 100,000 should be offered to the then stockholders of Chase Bank for subscription at $100 per share and 100,000 should be allotted to the stockholders of Mechanics Bank, share for share (R. 23-4, 536-7). The agreement further provided that, subject to the above conditions, Chase Bank should furnish to the consolidated bank not less than approximately $55,000,000, and Mechanics Bank not less than approximately $24,000,000, in net assets (R. 24, 537-8). In addition the agreement provided that $500,000 in assets of Mechanics Bank should be transferred before the effective date of the consolidation to a corporation, the stock of which should be distributed pro rata to shareholders of Mechanics Bank or their assigns upon whatever terms and conditions should be deemed proper by its Board of Directors (R. 24, 538).

On March 6, 1926, the Board of Directors of Mechanics Bank caused the incorporation of Mechanics Securities under the laws of New York with an initial capital of $500,000 represented by 100,000 shares of $5 par value (R. 44, 95, 569, 576) and prior to the merger Mechanics Bank transferred to Mechanics Securities (subject to retransfer in event the merger should not become effective) a note receivable for $500,000, and the latter issued its 100,000 shares in the names of the stockholders of Mechanics Bank (R. 47, 609-11, 624-729).

Exchange of Stock of Petitioner for Stock of Mechanics Securities. In order to maintain the parity of ownership of the shares of Petitioner and of Chase Bank (R. 115) Petitioner entered into an exchange agreement dated February 11, 1926 with a committee of Mechanics Bank stockholders and agreed if the merger of Mechanics Bank and Chase Bank became effective to exchange 100,000 shares of its stock, share for share, for the stock of Mechanics Securities (R. 31-6, 92, 529-533). At a meeting of stockholders of Petitioner the exchange agreement was ratified, an increase in authorized stock from 200,000 to 400,000 shares was approved and a proposal was approved to offer 100,000 of the additional shares to Petitioner's then stockholders for subscription at $5 per share (exercisable only on subscription at $100 per share for an equal number of shares of Chase Bank) and to issue the remaining 100,000 additional shares in accordance with the exchange agreement (R. 44-6, 596-7).

The merger of the two banks became effective at the close of business April 10, 1926 (R. 47, 99).

Pursuant to the exchange agreement Petitioner issued and delivered from April 12, 1926 to December 27, 1927,

100,000 shares of its stock in exchange for 100,000 shares of Mechanics Securities stock (R. 49, 100).

Thus all stockholders of Mechanics Bank who acquired shares of consolidated bank stock as a result of the merger acquired an equal number of shares of Petitioner's stock (R. 100-101). The 100,000 shares of Chase Bank offered to its shareholders at $100 per share and the 100,000 shares of Petitioner offered to its shareholders at $5 per share were fully subscribed for, issued and delivered. All of the 200,000 additional shares of Chase Bank and all of the 200,000 additional shares of Petitioner were deposited under the deposit agreement and the parity of ownership of Chase Bank stock and of Petitioner's stock remained as complete after the merger as before (R. 100-101).

It was stipulated (R. 111) and the Board found (R. 49) that the excess of Petitioner's assets over its liabilities during the period from April 10, 1926 to December 27, 1927 was at no time less than $21,082,183.76, the asset value of each of its 400,000 shares being therefore not less than $52.7054594.

Dissolution of Mechanics Securities. Mechanics Securities was dissolved on October 26, 1928 and on October 29, 1928 it was completely liquidated and Petitioner received all its assets, consisting of $444,816.94 in cash as a first and final liquidating dividend (R. 50, 101-2).

Petitioner's Contention. Petitioner's position before the Commissioner, before the Board and in the court below was and is that it issued 100,000 shares of its stock in exchange for 100,000 shares of Mechanics Securities stock; that the cost of said Mechanics Securities stock was the fair market value of its own stock issued in exchange there-

for; that such value was not less than $5,270, 545.94*; and that when in 1928 Petitioner liquidated Mechanics Securities and received $444,816.94 in cash, Petitioner sustained a deductible loss to the extent of the difference between the cost and the amount received, that is, a loss of not less than $4,825,729* (R. 52-3).

Commissioner's First Position. The position first taken by the Commissioner was "that subscription rights were vested in Mechanics Securities Corporation stockholders as to 100,000 shares of Chase Securities Corporation stock and that the conveyance of Mechanics Securities Corporation stock to the Chase Securities Corporation was in the exercise of such rights not a true 'exchange' of property and no actual loss was sustained." This position was taken in the Commissioner's statement (R. 13-15) attached to his notice of deficiency which was the basis of Petitioner's petition for redetermination in the Board of Tax Appeals, and in reliance upon the position so taken the voluminous stipulation of facts was entered into and the additional evidence was taken.

This wholly untenable theory was abandoned by the Commissioner and was not even referred to by the Board.

Commissioner's Second Position. A second theory was advanced by the Commissioner on the argument before the Board after the stipulation was entered into and after all the evidence had been taken. His new position was that the fair market value of Petitioner's shares issued in exchange for the shares of Mechanics Securities was necessarily limited to $500,000 because Petitioner was at no time free

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* Petitioner alleged in its petition before the Board that the fair market value of its shares was $8,280,549.90. Following the stipulation as to Petitioner's net worth (*supra*, p. 7) it claimed that the fair market value of its 100,000 shares of stock was not less that $5,270,545.94 and that its loss was not less than $4,825,729. In its return the loss claimed was $4,307,066.58 on the basis of a claimed fair market value of its shares of $4,751,883.52.

to offer the stock in question on the open market but was restricted in the use of said shares so that it could receive upon its issuance only the stock of Mechanics Securities which had assets of $500,000 only and therefore the loss on liquidation could not exceed the difference between that amount and the amount received as a final liquidating dividend, which difference was $55,183.06 (R. 53-4).

This position of the Commissioner, which we submit is equally untenable with his first position, the Board stated was not required to be determined (R. 59), although it was discussed in the Board's opinion (R. 53-8).

The Board's Position. The Board took a third position, wholly different from any which had been advanced by the Commissioner, as to which Petitioner had no opportunity to be heard, much less introduce evidence, and of which Petitioner had no notice until after the decision of the Board, as it was first mentioned in the findings of fact and opinion of the Board (R. 59-65).

The Board held that the 100,000 shares of Petitioner's stock were issued not alone for the 100,000 shares of Mechanics Securities stock but also as a part of the consideration for the assets of Mechanics Bank which were transferred to Chase Bank (R. 59, 64). This ruling was made by the Board notwithstanding its statement in its opinion that

> "Both parties have proceeded with the hearing under the assumption that the petitioner issued the said shares *solely* for all of the authorized capital stock of the Mechanics Securities Corporation, and if that assumption is correct, the total amount determined as the fair market value of the said 100,000 shares of petitioner represents the cost of the Mechanics Securities stock" (R. 59).

The Board might well have said that the whole case from beginning to end, including the pleadings, the stipulation and the taking of evidence, and finally the argument before it, had proceeded on that theory. At no time during the course of the proceeding was that underlying assumption of fact contested or even questioned.

The court below affirmed in the following *per curiam* opinion:

> "Although the tax involved is large, this appeal raises only disputed questions of fact as to which the board's findings are amply supported by the record. Decision affirmed." (R. 762).

Questions Presented.

1. Whether upon this record Petitioner should not be adjudged to have sustained in 1928 a deductible tax loss upon the liquidation of Mechanics Securities measured by the difference between the value of its stock (not less than $5,270,545.94) issued in exchange for all of the stock of Mechanics Securities and the amount received as a final liquidating dividend upon dissolution of Mechanics Securities.

2. Whether the cause should not be remanded to the Board of Tax Appeals to afford Petitioner an opportunity to offer evidence to disprove assumptions and inferences of fact made by the Board in support of a conclusion deemed by it controlling which was first mentioned in its opinion and which was wholly inconsistent with an underlying assumption of fact upon which both the Commissioner and Petitioner had proceeded from beginning to end of the case.

Statutes Involved.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 111. Determination of Amount of Gain or Loss.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * * *

Sec. 112. Recognition of Gain or Loss.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, * * *

* * * * * *

Sec. 113. Basis for Determining Gain or Loss.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *

* * * * * *

Sec. 115. Distributions by Corporation.

* * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock,

and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * * *

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that Petitioner sustained a deductible tax loss in 1928 upon the liquidation of Mechanics Securities measured by the difference between the market value of its stock (not less than $5,270,545.94) issued in exchange for the stock of Mechanics Securities and the amount received as a final liquidating dividend ($444,816.94).

2. In failing to hold that the 100,000 shares of Mechanics Securities constituted the sole consideration for the 100,000 shares of Petitioner issued in exchange therefor.

3. In sanctioning the action of the Board in deciding the matter before it upon a theory wholly inconsistent with an underlying assumption of fact upon which both Petitioner and the Commissioner had proceeded throughout the case, without opportunity to Petitioner to disprove unwarranted assumptions and inferences made by the Board which were necessary to support its theory.

4. In holding that the case involved only disputed questions of fact.

5. In affirming the decision of the Board.

Reasons Relied On for the Allowance of the Writ.

The court below in approving the action of the Board of Tax Appeals in deciding the controversy upon a ground inconsistent with an underlying assumption of fact indulged in by both parties throughout the entire proceeding, without an opportunity to refute by evidence assumptions and inferences of fact made by the Board necessary to its decision, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Cf. *Hormel* v. *Helvering,* U. S. , 61 S. Ct. 719, 85 L. Ed. 651; *Helvering* v. *Richter,* U. S. , 61 S. Ct. 723, 85 L. Ed. 656; both decided March 17, 1941.

As above stated, both the Commissioner and the Petitioner assumed as a fact that the sole consideration for the 100,000 shares of Petitioner's stock was the 100,000 shares of Mechanics Securities stock for which they were exchanged. No suggestion to the contrary was made during the whole course of the proceeding until the final decision and opinion of the Board of Tax Appeals. That fact was assumed in the Commissioner's statement attached to his notice of deficiency. It was assumed by Petitioner in its petition to the Board of Tax Appeals for redetermination. It was assumed by both the Commissioner and Petitioner in entering into the stipulation of facts, in the taking of testimony and in the hearing and argument before the Board. The fact so assumed was fundamental.

The Board of Tax Appeals, although expressly stating that both parties had proceeded under that assumption of fact and conceding that if such assumption was correct the total amount determined as the fair market value of the 100,000 shares of Petitioner represented the cost of the Me-

chanics Securities stock (R. 59), reached a directly contradictory conclusion, holding that the 100,000 shares of Mechanics Securities stock did not constitute the sole consideration for Petitioner's 100,000 shares.

The Board purported to base its conclusion upon an examination of all of the circumstances of the merger of the two banks, the organization of Mechanics Securities and the exchange of stock of Petitioner and of Mechanics Securities. It rejected the only direct testimony in the record as to the reason why 100,000 shares of Petitioner's stock were issued to the stockholders of Mechanics Securities which had assets of only $500,000. That testimony by the treasurer of Petitioner was that the motive of Petitioner was to preserve the parity of ownership of the stock of Chase Bank and of Petitioner, that it was necessary that every share of Mechanics Securities be deposited under the exchange agreement and to that end it was necessary to offer special inducement to the stockholders of Mechanics Securities (R. 115-116).

The Board said:

> "If the maintenance of such joint and equal ownership had been the controlling factor the most logical method of accomplishing that result would have been through the proration of the assets of the Mechanics Bank to petitioner and the Chase Bank so that the Mechanics Bank would furnish the same percentage of capital to each corporation and through the issuance of stock to the Mechanics Bank stockholders on the basis of the percentage so determined." (R. 62-63).

The Board then set forth figures which it claimed showed "that the Mechanics Bank was furnishing approximately 33 percent of the net assets of the consolidated

bank and its stockholders were receiving only 25 percent of the stock of such bank while the Chase Bank was furnishing only slightly more than 67 percent of the net assets and its stockholders were receiving 75 percent of the stock" (R. 63).

Even if the Board's figures were correct (and there is no evidence to support them), its conclusion is sheer conjecture and is tantamount to a substitution of its judgment for that of the management and the directors of Petitioner. The Board, it would appear, did not consider the fact that under the applicable consolidation statute (Act of November 7, 1918, c. 209, 40 Stat. 1043) only a two-thirds vote of the stockholders of Mechanics Bank was required and that if the merger had become effective all the stockholders of Mechanics Bank would have been entitled to receive shares of the consolidated bank, whereas there was no method of compelling any who did not elect to do so to accept shares of Petitioner in exchange for shares of Mechanics Securities and to deposit the shares of Petitioner along with the shares of the consolidated bank. Nor, apparently, was any thought given to the fact that the stockholders of Mechanics Bank had theretofore had their investment solely in a banking business and there was no assurance that they would have been willing to divide their investment between a bank and a corporation engaged in a general securities business, proportionately on the basis of their respective assets. It was vitally important to Petitioner that every share of Mechanics Securities stock should be exchanged for a share of its own stock in order that the parity of ownership of shares of stock of the Bank and of Petitioner should be maintained and it was not only logical, but necessary, that special inducement should be made so as to avoid any risk of that result not being accomplished.

We do not need to rely alone upon such reasoning, however. The figures by which the Board attempted to support its conclusion are not only demonstrably incorrect on the record before it, but are based upon an assumption of fact which has no support whatever in the record. The figures are set forth in a footnote (R. 63) in the Board's opinion as follows:

	"Net assets prior to merger, April 10, 1926	Total net assets after merger
Chase Bank	[1] $53,035,531.29 (67.0884476 plus ....%)	.....
Mechanics Bank	[2] $26,017,618.90 (32.9115523 plus ....%)	.....
Consolidated Bank	.....	$79,053,150.19 (100%

[1] Including $10,000,000 new capital and excluding $4,500,000 charged against total undivided profits of the merged banks and credited to suspense.

[2] Includes $412,581.13 credited to total undivided profits of the merged banks in excess of the closing figure as shown by Mechanics' books."

These figures are based upon an exhibit marked "Respondent's [Commissioner's] Exhibit N" (R. 274, 275) which is part of the stipulation of facts (R. 103, 105). It will be observed that the figure ($53,035,531.29) of net assets (reflected in capital, surplus and undivided profits) of Chase Bank prior to the merger, as stated by the Board, does not appear in Exhibit N, nor does it appear anywhere else in the record. The correct figure is stated in Respondent's Exhibit N as $47,535,531.29. The Board's figure is arrived at by adding to said correct amount the $10,000,000 of new capital contributed by stockholders of the Chase Bank and deducting therefrom $4,500,000 which after the merger was "Charged against total Undivided Profits of the merged banks and credited to Suspense" (R. 275). Such deduction was arbitrary and without justification on the record before the Board. There is not one syllable of testimony or evidence in the record which even suggests that said amount should be charged against the contribu-

tion of the Chase Bank to the consolidated bank. We do not claim that any inference or assumption should be made with respect to that subject, as it would seem to be clearly a matter for proof if the fact were material.* But if conjecture were to be indulged in, would it not be at least as reasonable to suppose that the whole of the amount should be charged against assets of the Mechanics Bank in order to conform to the basis of valuation on which the Chase Bank carried similar assets? If that were done and if relative percentages have the importance which the Board attaches to them, it is strikingly significant that the Chase Bank would have contributed approximately 73% and Mechanics Bank approximately 27% of the total net assets of the consolidated bank and the disparity in the proportionate stock interests in the consolidated bank as compared with their respective contributions would have been so negligible as not even to have been the subject of comment. It is noteworthy also that the Board has used net asset figures and no consideration is given to other elements of value such as good will, value of name, management, prospects, etc., of the respective banking institutions.

The Board was unwilling to accept the assumption of fact that Petitioner's stock was issued solely for the Mechanics Securities stock (although such assumption, it conceded (R. 59), was supported by the literal wording of the exchange agreement) because of the disparity in value of the securities exchanged.

This same reluctance was manifested by the Board in *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, where it declined to give effect to the plain intention of the parties to effect exchanges of property having considerable disparity of

* It could be shown, if opportunity were afforded, that there is no basis in fact for charging said amount against the assets contributed by Chase Bank.

value. In that case as in this it held that property received in exchange did not constitute the entire consideration for shares of stock exchanged. The Circuit Court of Appeals reversed the decision of the Board and this Court affirmed, holding that while the circumstantial facts must be taken as established by findings of the Board if supported by substantial evidence (p. 490), the ultimate finding by the Board on the question of consideration was "a conclusion of law or at least a determination of a mixed question of law and fact", that it was "to be distinguished from the findings of primary, evidentiary or circumstantial facts", and that it was "subject to judicial review and, on such review, the court may substitute its judgment for that of the Board" (p. 491).

In this case the Circuit Court of Appeals in effect declined to review the decision of the Board, holding that there were involved only disputed questions of fact.

On the contrary, on this record the facts (except the value of Petitioner's stock) are undisputed and an assumption of fact made by both parties throughout the proceeding was rejected and the contrary conclusion adopted by the Board without notice and without opportunity to offer testimony or even be heard upon the question which the Board deemed conclusive.

In its petition for review in the court below Petitioner stated (R. 78-79) the respective positions taken by Petitioner and the Commissioner before the Board of Tax Appeals, and further stated that the Board did not determine the issue presented by the conflicting contentions of Petitioner and the Commissioner but that

> "although, as the Board stated, both parties had proceeded with the hearing upon the assumption that petitioner issued its 100,000 shares solely for all of the authorized capital stock of Mechanics Se-

> curities Corporation, the Board adopted an entirely different theory, one which is inconsistent with the contention of respondent [The Commissioner] before the Board, one for which there is no support in the evidence, and which petitioner has had no opportunity to rebut, namely, that the 100,000 shares of Mechanics Securities Corporation were only a part of the consideration which petitioner received for the 100,000 shares of its stock issued to the stockholders of Mechanics Securities Corporation."

In its assignments of error Petitioner complained of the findings and rulings made by the Board on that subject as being wholly unsupported by evidence in the record (R. 80-85).

Under similar circumstances the United States Circuit Court of Appeals for the Seventh Circuit held that the Board should have decided the case before it on the issues tried. *Booth Fisheries Co.* v. *Commissioner,* (C. C. A. 7th) 84 F. (2d) 49. There the taxpayer, a domestic corporation, claimed the right to take a deduction in a consolidated return for losses sustained by Canadian subsidiaries. Both the taxpayer and the Commissioner had proceeded before the Board of Tax Appeals upon the assumption that the losses claimed had been sustained and the case was tried on that theory, the sole issue being the purpose for which the subsidiaries were maintained. The Board, however, on its own motion found that the losses had not been proved and ruled against the taxpayer. The court reversed, saying (84 F. (2d) p. 51):

> "We are inclined to agree with petitioners that the effect of the conduct of respondent, coupled with the report of his agent, and other documentary proof in the record, was a concession of the asserted loss of the Canadian Companies, and that it would be manifestly unfair to the taxpayers, if they be

> otherwise entitled to credit for such loss, to deny their claim on the basis of their failure to prove a loss before the Board when no active controversy had arisen about the actual loss, but only with the right to claim such loss as a deduction. See *Helvering* v. *Taylor,* 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623, and cases there cited."

Petitioner contends that upon the record before this Court, effect should be given to the assumption of fact and the decision of the Board of Tax Appeals should be reversed, and judgment entered dismissing the deficiency claim of the Commissioner and allowing Petitioner's claim for refund of tax paid for the calendar year 1928 in the sum of $55,638.90. Petitioner's claim is based, as above stated, on its loss of not less than $4,825,729 during that calendar year measured by the difference between the value of its 100,000 shares of stock and the final liquidating dividend received by it upon the dissolution of Mechanics Securities. The Board of Tax Appeals stated in its opinion that "those shares, when issued, represented 25 percent of the total authorized and outstanding stock of a prosperous corporation, a corporation which owned net assets amounting to at least $21,082,183.76 and for each of the five years preceding had net profits in excess of $1,500,000 and for each of the four preceding years had paid dividends amounting to $800,000." (R. 62). The value of its stock was clearly established as not less than $5,270,545.94 and as stated by the Board, if the assumption of fact upon which the case was based is correct "the total amount determined as the fair market value of the said 100,000 shares of petitioner represents the cost of the Mechanics Securities stock" (R. 59).

Petitioner therefore prays that a writ of certiorari issue bringing up the entire case to the end that this Court

may review it and direct such final judgment as it may determine to be just.

If, however, this Court should conclude that the question whether the 100,000 shares of stock of Mechanics Securities constituted the sole consideration for the 100,000 shares of stock of Petitioner issued in exchange therefor is an issue which should be determined notwithstanding the record in this case and the assumption of that fact throughout by both parties, Petitioner earnestly contends that such issue should be determined only after it has been afforded an opportunity to introduce evidence and to be heard upon it before the Board of Tax Appeals. Petitioner in that event prays that this Court issue a writ of certiorari and that the judgment of the court below be reversed with directions to remand the case to the Board of Tax Appeals to afford Petitioner such opportunity.

Similar relief was granted by this Court in *Hormel* v. *Helvering,* ..... U. S. ....., 61 S. Ct. 719, 85 L. Ed. 651, and *Helvering* v. *Richter,* ..... U. S. ....., 61 S. Ct. 723, 85 L. Ed. 656, both decided March 17, 1941, two weeks after the opinion in this case was handed down by the court below and the day before the time within which to apply for a rehearing expired under its rules. Both cases involved income from trusts and in both cases the Commissioner and the taxpayer had proceeded before the Board of Tax Appeals on the assumption that Section 166 of the Revenue Act of 1934 was controlling. After the cases had been decided by the Board of Tax Appeals, this Court held in *Helvering* v. *Clifford,* 309 U. S. 331, that under Section 22(a), 26 U. S. C. A. Int. Rev. Acts, page 669, the income of certain trusts was taxable. In the Circuit Courts of Appeals the Commissioner in each case abandoned reliance on Section 166 and argued that the income was tax-

able under Section 22(a). The taxpayer contended that Section 22(a) was not open for consideration since it had not been relied on before the Board. This Court held that it was proper for the Circuit Courts of Appeals to take into consideration the applicability of Section 22(a) but that the taxpayer should not be "foreclosed from all opportunity to offer evidence before the Board on this issue, however remote may be his chance to take his case out of the Clifford rule" (61 S. Ct., p. 723). Accordingly, the order in each case was a reversal of the judgment of the Circuit Court of Appeals with appropriate directions to the Board of Tax Appeals for further proceedings.* In the *Hormel* case this Court said in footnote 10 of its opinion:

> "In this connection petitioner pointed out in his brief before the Circuit Court of Appeals that 'If any contention whatsover had at any time been suggested or considered as to Section 22, the matter of the evidence introduced or to be introduced would have required further consideration'."

In the *Richter* case this Court said:

> "Respondent urges that had he been advised with fair certainty that the Government relied upon section 22(a), he could have introduced additional evidence directed to that issue."

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* Following this Court's decisions in the *Hormel* and *Richter* cases, the United States Circuit Court of Appeals for the Sixth Circuit in *Commissioner of Internal Revenue* v. *Central National Bank of Cleveland* (.... F. (2d) ...., decided May 8, 1941), remanded to the Board of Tax Appeals for further evidence a case which had been tried before the Board on stipulation and evidence relating exclusively to the question whether the estate was taxable under Section 166, the Commissioner having invoked Section 22(a) for the first time in the Circuit Court of Appeals.

In those cases the question was whether the appellate court should consider an issue not raised before the Board of Tax Appeals. Here the question is whether the Board of Tax Appeals should have decided a question which not only was not in issue before it but which was supposedly beyond controversy because of the asumption of fact made by both parties. It would seem that in such a case there would be the greater reason for affording an opportunity to meet the issue raised for the first time by the Board of Tax Appeals in its final decision.

Certainly had Petitioner been advised that, contrary to the assumption of fact made both by the Commissioner and Petitioner throughout the proceedings before the Board, any question would be raised that the 100,000 shares of Mechanics Securities stock did not constitute the sole consideration for its 100,000 shares issued in exchange therefor, Petitioner not only would have given further consideration to "the matter of the evidence introduced or to be introduced" but could and would have introduced evidence directed to that issue.

Petitioner has been denied a hearing on the question which the Board itself first raised in its final decision and which it deemed decisive of the case and which had not been in controversy because of an assumption of fact by both parties throughout the proceeding. This would seem to be a serious "departure from the accepted and usual course of judicial proceedings" calling upon this Court for the exercise of its power of supervision.

Moreover it is submitted that the decision of the court below in sanctioning such a departure is in conflict with

the principles applied by this Court in the *Hormel* and *Richter* cases, *supra,* and with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Booth Fisheries Co.* v. *Commissioner,* 84 F. (2d) 49, *supra.*

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

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May 1941.